1985

Utah State Insurance Fund and Richfield Care Center v. State Industrial Commission and Torgerson : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHFIELD CARE CENTER and UTAH STATE INSURANCE FUND,	:	
Plaintiff-Appellants,	:	
-v-	:	Case No. 20412
LYDIA J. TORGERSON and UTAH STATE INDUSTRIAL COMMISSION,	:	
Defendant-Respondents.	:	

BRIEF OF APPELLANT UTAH STATE INSURANCE FUND

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-v-	:	Case No. 20412
LYDIA J. TORGERSON and UTAH STATE INDUSTRIAL COMMISSION,	:	
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BRIEF OF APPELLANT UTAH STATE INSURANCE FUND

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues to be decided on this appeal are:

1. Whether the Utah State Industrial Commission abused its discretion in ordering the employer to pay for an injury to the worker's compensation applicant which occurred on January 20, 1982 without a finding that the applicant suffered an accident in the course of employment.

2. Whether the Utah State Industrial Commission properly allocated responsibility for temporary total compensation and medical benefits between the employer and the Second Injury Fund.

STATEMENT OF THE CASE

This is a Petition for Review of an Order of the Utah State Industrial Commission awarding compensation and medical benefits to Ms. Torgerson for back injuries which occurred on July 6, 1980 and January 20, 1982, and requiring the Second Injury Fund to

reimburse the employer for only one-third of the temporary total compensation and medical benefits it paid.

STATEMENT OF FACTS

Ms. Torgerson began her employment at Richfield Care Center in July of 1979 and continued with the same duties thereafter. Those duties included responsibility for dressing patients and getting them ready for their daily routine (R. 21).

On July 6, 1980, she was sitting a patient in a chair, lost her balance and was forced against the wall, striking her back (R. 41-42, 58-59). She describes no additional back pain after a subsequent hysterectomy and bladder repair she underwent in July of 1980 (R. 33-35).

At the hearing in this case, Ms. Torgerson described an incident which took place on January 20, 1982. She reached to pull a T-shirt down over the shoulders of a patient who was sitting up in bed when she experienced a pain in her back (R. 21-24, 58-59).

After the hearing, the Administrative Law Judge, in Findings of Fact, Conclusions of Law and Order dated May 4, 1983, made the following Findings:

> The 1980 incident was clearly an industrial accident, but no claim was made by the applicant for that incident. The only event for which a claim is being made is for an incident that occurred on January 20, 1982 (R. 134).

The Administrative Law Judge went on to find:

> There was nothing unusual about the activities on the morning of January 20, 1982 nor was

> there any unusual strain, twisting, fall, bump or even an unusual movement.
>
> In the this (sic) case there was no unusual exertion nor anything unusual about the activities of the applicant. There was no unanticipated, unintended occurrence different from what would normally be expected to occur and there was no unforeseen or unexpected event to precipitate the symptoms complained of by the applicant (R. 135) (See Attachment A).

The Administrative Law Judge, relying on Sabo's Electronic Service v. Sabo, 642 P.2d 774 (Utah 1982), determined that the incident described on January 20, 1982 did not constitute an injury by accident (R. 135).

On January 3, 1984, the applicant's attorney filed a Motion for Review or Supplemental Order requesting that the Commission reconsider the Findings of the Administrative Law Judge as to the incident of January 20, 1982, and also allow for amendment of the application to include a claim on the July 6, 1980 incident (R. 143-145). While that Motion was untimely, the Commission, through the Administrative Law Judge, ordered the case reopened because notice had not been received by the applicant's attorney of the prior Findings of Fact and Conclusions of Law (R. 147-148, 152-154) (see Attachment B).

The case was referred to an independent medical panel consisting of Dr. Frank Dituri and Dr. Mark Greene. They found that Ms. Torgerson suffered a 2.5% impairment of the whole body attributable to the July 6, 1980 industrial accident, a 2.5% whole body impairment attributable to conditions existing prior to July

6, 1980, and a 2.5% impairment attributable to the incident of January 20, 1982 (R. 164-166).

The Administrative Law Judge then entered Findings of Fact, Conclusions of Law and Order on October 3, 1984 which allowed for amendment of the application for hearing to include the July 6, 1980 incident which the Administrative Law Judge found to be an accident in the course of employment. The Administrative Law Judge further concluded:

> Though the Administrative Law Judge found the 1982 incident did not amount to an accident for which benefits could be recovered in the first order, we now find that the applicant is entitled to benefits as a result of the 1982 incident inasmuch as it was an incident which aggravated a previous industrial injury with the same employer.

The Administrative Law Judge further concluded that:

> The defendant employer and the State Insurance Fund are entitled to reimbursement from the Second Injury Fund for payments of temporary total disability and medical expenses based on ratio of 2.5 over 7.5, or 33% (R. 178) (see Attachment C).

A Motion for Review was filed by the Utah State Insurance Fund on the 18th of October, 1984 (R. 181-185) (see Attachment D). The Industrial Commission of Utah denied the Motion for Review on December 13, 1984 without additional findings (R. 186) (see Attachment E).

A Petition for Review and Docketing Statement were filed with this Court requesting a review of the Industrial Commission's Order on January 7, 1985 (R. 188-192).

SUMMARY OF ARGUMENT

The employer and its compensation insurer, the Utah State Insurance Fund, argue that the Utah State Industrial Commission acted arbitrarily and capriciously and in excess of its authority in two respects:

1. By awarding compensation and medical benefits to Ms. Torgerson for injuries suffered on January 20, 1982 after the Administrative Law Judge found that the injuries on that date did not result from an accident.

2. By failing to allocate 50% of the temporary total compensation and medical benefits resulting from the July 6, 1980 accident to the Second Injury Fund in accord with the medical panel findings adopted by the Administrative Law Judge.

ARGUMENT

POINT I

RICHFIELD CARE CENTER AND/OR THE UTAH STATE INSURANCE FUND HAVE NO LIABILITY ARISING OUT OF THE INCIDENT OF JANUARY 20, 1982, AND THE COMMISSION'S ORDER IS ARBITRARY AND CAPRICIOUS.

The Administrative Law Judge in his Findings of Fact, Conclusions of Law and Order of May 4, 1983 applied the proper standard announced by this Court in determining that Ms. Torgerson had not suffered a "injury by accident" during the incident of January 20, 1982. The standards set forth by the Legislature of the State of Utah in determining whether or not an injury which occurs in the course of employment is compensable is stated specifically in Utah Code Ann., Section 35-1-45 (1953) as follows:

> Every employee . . . who is injured . . . by accident arising out of or in the course of his employment . . . shall be entitled to receive . . . such compensation for loss sustained on account of such injury . . . .

(See Attachment F for the complete language of Section 45). The Administrative Law Judge's complete findings were:

> The applicant had worked at the Richfield Care Center since July 1979 with her principal duties being to help dress patients and prepare them for their daily routine which required constant lifting, supporting, maneuvering, and dressing patients every morning or, if on a different shift, doing similar work preparing patients for bed. There was nothing unusual about the activities on the morning of January 20, 1982, nor was there any unusual strain, twisting, fall, bump or even an unusual movement.
>
> In the this (sic) case there was no unusual exertion nor anything unusual about the activities of the applicant. There was no unanticipated, unintended occurrence different from what would normally be expected to occur and there was no unforeseen or unexpected event to precipitate the symptoms complained of by the applicant. The movements being made by the applicant were movements made hundreds of time (sic) before and, at least, as to straightening the patients' clothes, were no different than movements made by any ordinary person in the process of doing everyday activities such as dressing and undressing.

The Administrative Law Judge went on to cite Sabo's Electronic Service v. Sabo, 642 P.2d 772 (Utah 1982). Relying upon the Sabo decision, the Administrative Law Judge found the activities of Ms. Torgerson were similar to the activities Mr. Sabo was involved in, both had pre-existing back problems, and the work activities complained of required very little exertion.

It is the position of the Utah State Insurance Fund that the Administrative Law Judge was correct in his Findings of Fact that Ms. Torgerson had done nothing unusual, had experienced no unusual strain, twisting, fall, bump or unusual movement; therefore her activities on January 20, 1982 fell directly in line with the Sabo decision. The incident of January 20, 1982 was not an "injury by accident" as required by Section 45, and petitioners herein cannot be held liable for the medical expenses, time off work or permanent impairment from that injury.

The Administrative Law Judge, in his Findings of Fact, Conclusions of Law and Order dated October 3, 1984, held the State Insurance Fund liable for compensation and medical expenses arising out of the 1982 incident:

> The Administrative Law Judge found the 1982 incident did not amount to an accident for which benefits could be recovered in the first order. We now find that the applicant is entitled to benefits as a result of the 1982 incident inasmuch as it was an incident which aggravated a previous industrial injury with the same employer.

The Administrative Law Judge never reconsidered or overturned his prior findings that the incident of January 20, 1982 was not an unusual exertion, did not involve extraordinary stress, and therefore was clearly within the Sabo guidelines. There are no provisions in the Utah worker's compensation statute to hold an employer liable for additional compensation and medical benefits for the aggravation of an industrial injury caused by ordinary daily activity. The provisions of Utah Code Ann., Section 35-1-45 establish the threshold which an applicant must meet in order for

any injury to be compensable. That Section requires that the injury be the result of an industrial accident in the course of employment.

This Court, in Giles v. Industrial Commission of Utah, ___ P.2d ___ (slip op. 19711 filed October 25, 1984), overturned the Industrial Commission's Order denying that Mr. Giles had incurred an industrial accident and reinstated the Administrative Law Judge's finding that an accident had occurred, primarily because there were no substitute findings of fact to substantiate the Commission's Order. In the case at bar, the Administrative Law Judge's Order of October 3, 1984 contained no findings that an accident had occurred in the course of employment on January 20, 1982. The Commission's denial of plaintiff's Motion for Review contained no additional findings of fact, but simply adopted the Administrative Law Judge's findings. Therefore, the only findings in this record relating to the January 20, 1982 incident were the findings of the Administrative Law Judge in his Order dated May 4, 1983. He found the January 20, 1982 incident did not constitute an unusual or unexpected stress or exertion, but was the normal daily activity of the applicant herein. Thus, there is no finding of accident in the record upon which an award can be based.

This Court has long held that its standard of review on factual matters will be:

> whether the Commission's findings are "arbitrary or capricious" or "wholly without cause" or contrary to the "one (inevitable) conclusion from the evidence" or without "any substantial evidence" to support them. Only

> then should the Commission's findings be displaced.

Kaiser Steel Corp. v. Monfredi, 631 P.2d 888, 890 (Utah 1981). The record clearly establishes that Ms. Torgerson, at the time she felt pain in her back on January 20, 1982, was not engaged in any lifting, straining or unusual exertion. Her descriptions of the events of January 20, 1982 clearly provide sufficient evidence for the Administrative Law Judge to make the Findings that he made on May 4, 1983. It is those Findings (the only findings regarding the January 20, 1982 incident in the record) to which this Court must apply its standard of review.

Clearly, the finding that this was not an accident in the course of employment is not arbitrary or capricious, or wholly without cause; therefore this Court must uphold those findings. By relying on this Court's decision in Sabo, the Administrative Law Judge clearly applied the appropriate legal standard in his Order of May 4, 1983 to the facts as he found them in determining that no accident had occurred. Since the employer's liability is contingent upon an accident under the provisions of Section 35-1-45, the Order of the Commission requiring the State Insurance Fund to pay compensation for the incident of January 20, 1982 must not stand.

POINT II

THE ADMINISTRATIVE LAW JUDGE IMPROPERLY ALLOCATED THE RESPONSIBILITY FOR TEMPORARY TOTAL COMPENSATION AND MEDICAL BENEFITS BETWEEN THE STATE INSURANCE FUND AND THE SECOND INJURY FUND.

As the facts clearly set forth, the Industrial Commission was considering applications for compensation on two distinct industrial occurrences in this case. The first occurrence, which the State Insurance Fund does not contest, was an industrial accident which happened on July 6, 1980. The medical panel found that prior to July 6, 1980, Ms. Torgerson had a 2.5% permanent bodily impairment due to a prior injury to her back. The medical panel also found that the July 6, 1980 incident increased that impairment to her back by another 2.5%. The medical panel then went on to consider the impairment resulting from the January 20, 1982 occurrence, which the Administrative Law Judge had already found did not constitute an accident. The panel attributed 2.5% permanent bodily impairment to that occurrence.

The Administrative Law Judge, in making his calculations to determine the amount of contribution the Second Injury Fund should make, treated the 1980 and 1982 incidents as a single industrial incident. This Court has consistently held that the Commission must consider separate accidents serially in order to determine physical impairment attributable to each accident, and also the relationship each accident bears to a person's total physical impairment. See Jacobson Construction & Industrial Indemnity Co. v. Hare, 667 P.2d 25 (Utah 1983); Northwest Carriers, Inc.,

v. Industrial Commission of Utah, 639 P.2d 138 (Utah 1981); Second Injury Fund v. Perry's Mill & Cabinet, 684 P.2d 1269 (Utah 1984).

In Jacobson Construction v. Hare, this Court clearly illustrated to the Commission the proper method for converting whole man impairment to partial man impairment ratings based on a series of events. Mr. Hare, who had a 25% congenital impairment, later suffered a 10% whole man impairment, and finally suffered a 50% whole man impairment from an industrial accident. This Court subtracted the 25% initial impairment from 100% whole man, resulting in a 75% whole man for rating purposes. Thus, when the 10% whole man impairment acted upon the 75% man, it resulted in an 8% increase of impairment, thus leaving Mr. Hare a 67% man for rating purposes. The Court thus held that the 50% whole man impairment acting upon the 67% man for impairment rating purposes resulted in a 34% increase in impairment of Mr. Hare.

This is a clear illustration of the proper allocation of serial impairments. In the instant case, Ms. Torgerson, following the incident of July 6, 1980, was a 5% impaired person (determining partial person figures on such low values and then rounding those figures off is insignificant; the easiest way to treat this incident is to use the whole person impairment rating given by the medical panel), 2.5% being due to pre-existing conditions and 2.5% being due to the industrial accident of July 6, 1980. Thus, the proper allocation of responsibility for temporary total compensation and medical expenses is 50% to be paid by the employer and

its insurance carrier and 50% to be paid by the Second Injury Fund.

While it is the position of the State Insurance Fund that this Court need not consider the impairment resulting from the occurrence of January 20, 1982 since no accident occurred, if the additional impairment of that date is to be considered, then the 2.5% increase in impairment (rounded to 3%) acted upon a 95% impaired person, the partial person figure would be rounded to 3%, thus resulting in a total impairment to Ms. Torgerson of 8%. In Second Injury Fund v. Perry's Mill & Cabinet, supra, this Court reaffirmed the method for determining Second Injury Fund liability. The method is to require the Second Injury Fund to pay a percentage of temporary total compensation and medical expense based on the ratio pre-existing impairment bears to total impairment. The Second Injury Fund, on the January 20, 1982 incident, would be liable for 5/8ths of the temporary total compensation and medical benefits, and the State Insurance Fund would be liable for 3/8ths. Instead, by combining all of the figures, treating the 1980 and 1982 incidents as one, the Administrative Law Judge found the State Insurance Fund liable for two-thirds of the temporary total compensation from both incidents. This is clear error under this Court's previously established criteria for determining proportional liability under Utah Code Ann., Section 35-1-69 (1976, as amended 1983).

CONCLUSION

Based on the facts contained in the record, this Court should order that because there are no findings to substantiate an industrial accident on January 20, 1982, the State Insurance Fund and Richfield Care Center are liable only for the impairment to Ms. Torgerson resulting from the 1980 industrial accident. Thus, the State Insurance Fund would be liable for 2.5% permanent partial impairment, and the Second Injury Fund would be liable for 2.5% permanent partial impairment. The temporary total compensation and medical benefits are then properly allocated 50% to the Second Injury Fund and 50% to the Utah State Insurance Fund.

DATED this 7th day of March, 1985.

BLACK & MOORE

Fred R. Silvester

CERTIFICATE OF MAILING

I hereby certify that I mailed 4 true and exact copies of the foregoing Brief, postage prepaid, this 8th day of March, 1985, to the following:

Michael J. Labrum
108 North Main
Richfield, UT 84701

Gilbert A. Martinez
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111

Stephen Schwendiman
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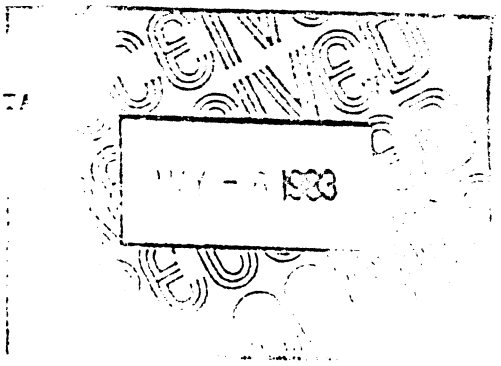
236 State Capitol
Salt Lake City, UT 84114

ATTACHMENT A



THE INDUSTRIAL COMMISSION OF UTA

Case No. 83000039

LYDIA J. TORGERSON, Applicant, vs. RICHFIELD CARE CENTER, STATE INSURANCE FUND, and SECOND INJURY FUND, Defendants.	*	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room, Utah Industrial Commission, 160 East 300 South, Salt Lake City, Utah, on April 25, 1983, at 10:00 o'clock a.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Keith E. Sohm, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Michael R. Labrum, Attorney at Law.

The defendants Richfield Care Center and State Insurance Fund were represented by Fred Silvester, Attorney at Law.

The Second Injury Fund was represented by Gilbert A. Martinez, Administrator.

FINDINGS OF FACT:

During the course of her employment with the defendant company on or about July 6, 1980 the applicant was trying to place a patient in a chair and fell striking first the wall and then hitting the floor. She suffered pain in the low back area which was medically treated apparently in a hospital. Three days later, surgery was performed for a hysterectomy and to repair a ruptured bladder. The applicant maintained it was the ruptured bladder that hurt rather than an injury back. The applicant indicated that she had no further pain in her back or treatment for her back. However, a letter from Dr. Henrie, an orthopedic physician, indicates that he examined her at the Richfield Hospital on July 10, 1980:

"in regards to her complaints of low back pain which she dates to an accident occurring while at work for the Richfield Care Center on July 6, 1980."

The doctor reported that on July 11 the patient was still having:

"aching through the low back area, difficulty moving or turning and had some difficulty in getting to an erect posture because of pain and discomfort."

The applicant further admitted on cross-examination that she wore a back brace continuously from July 1980 until January 1983 to protect her back, but denied any back problems during that period. The 1980 incident was clearly an industrial accident, but no claim is made by the applicant for that incident. The only event for which a claim is being made is for an incident that occurred on January 20, 1982. In the written application the applicant described the incident as:

"Getting a patient up for daily routine, lifted patient with right arm and reached to straighten up his clothes around shoulder."

At the hearing, the applicant further described the patient as a man weighing about 190 pounds who was lying down on a bed. Mrs. Torgerson had raised the patient to a sitting position, was supporting him with the hand, reached to pull a T-shirt over his head when she felt a pain in her lower back. The pain was severe, making it difficult to straighten up. She immediately reported the incident to the office and was told to fill out an accident report and go home. She drove herself home and was taken to a clinic by her daughter. She was examined by Dr. Smoot, given some medication, with bed rest and physical therapy recommended. Applicant returned to work on March 3, 1982 and was still having some back aches and some pain down the left leg, but worked 2 1/2 months until the condition became more severe. The applicant changed to Dr. Jackson who examined her on June 29, 1982 and recommended traction at the hospital and when conservative treatment did not help a CAT scan was taken at the University of Utah Hospital which was followed by surgery in September 1982. The applicant was released from the hospital on September 23, 1983 with an excellent result. Mrs. Torgerson was released to return to work in January of 1983 with a 5% permanent partial impairment rating.

The applicant had worked at the Richfield Care Center since July 1979 with her principal duties being to help dress patients and prepare them for their daily routine which required constant lifting, supporting, manuvering, and dressing patients every morning or, if on a different shift, doing similar

work preparing patients for bed. There was nothing unusual about the activities on the morning of January 20, 1982 nor was there any unusual strain, twisting, fall, bump or even an unusual movement.

In the this case there was no unusual exertion nor anything unusual about the activities of the applicant. There was no unanticipated, unintended occurrence different from what would normally be expected to occur and there was no unforeseen or unexpected events to precipitate the symptoms complained of by the applicant. The movements being made by the applicant were movements made hundred of times before and ,at least, as to straightening the patient's clothes, were no different than movements made by any ordinary person in the process of doing everyday activities such as dressing and undressing.

The case is directly in point with the recent decision of the Utah Supreme Court in Sabo's Electronic Service v. Sabo, 642 P.2d 722, decided February 19, 1982. The Court held in the Sabo case that when Sabo suffered a pain in his back reaching down to lift a box of clock radios the incident could not be held to be an accident even though the results were immediate. The Administrativbe Law Judge at first denied benefits in the Sabo case followed by the Commission's Order to remand to a medical panel. The medical panel found a relationship between the applicant's employment activities and the subsequent medical complications. A subsequent Order by the Commission finding an accident occurred was reversed by the Supreme Court with a finding of "no accident". There is a further similarity in that the applicant in both cases had a pre-existing back problem and the activities involved required very little exertion.

In light of the statutory definition, the law and recent cases from the Supreme Court, the Administrative Law Judge finds that no industrial accident occurred in this case and therefore that the applicant is not entitled to workmen's compensation benefits.

CONCLUSIONS OF LAW:

The Application should be denied.

ORDER:

IT IS THEREFORE ORDERED that the Application be, and the same is hereby, denied.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections and unless so filed this Order shall be final and not subject to review or appeal.

Keith E. Sohm
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah this 7th day of July 1983.

Linda Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on May 4, 1983 a copy of the attached Order was mailed to the following persons at the following addresses, postage paid:

Lydia J. Torgerson, 595 South 800 West, Richfield, UT 84701

Michael R. Labrum, Atty., 108 North Main, Richfield, UT 84701

Richfield Care Center, 1000 North Main, Richfield, UT 84701

State Insurance Fund, 560 South 300 East, SLC, UT 84111

Fred Silvester, Atty., Suie 500, Ten W Broadway, SLC, UT 84101

Gilbert A. Martinez, Administrator, Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By Marge

ATTACHMENT B

INDUSTRIAL COMMISSION OF UTAH

SCOTT M MATHESON, GOVERNOR

WALTER T AXELGARD, CHAIRMAN
STEPHEN M HADLEY, COMMISSIONER
MILTON E SAATHOFF, COMMISSIONER

February 21, 1984

Michael R. Labrum, Esquire
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108 North Main
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Fred Silvester, Esquire
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Attorneys at Law
261 East 300 South
Suite 300
Salt Lake City, Utah 84111

82-1727

Re: Lydia Torgerson
Inj: 01-20-82
Emp: Richfield Care Center

Gentlemen:

The State Insurance Fund, through its counsel Bruce Wilson, declined to enter into an agreement for compensating the Applicant. Mr. Wilson took the position that further consideration of the 1980 injury was barred by the three year Statute of Limitations.

The Hearing was held before the three year Statute of Limitation expired. I am considering the disclosures at the Hearing together with the medical reports making reference to the 1980 incident as sufficient notice to the Commission to satisfy the requirements of Section 35-1-99 and therefore rule that claims based on the 1980 incident are not barred by the Statute of Limitations.

The Applicant is instructed to file an Application for the 1980 incident and the matter will be referred to a Medical Panel for its evaluation of claims associated with that incident. I still suggest the parties settle the matter and a compromise on five percent or an agreed lesser figure may be in the best interests of all parties.

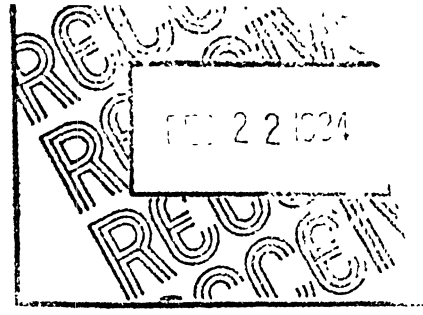
BY DIRECTION:

INDUSTRIAL COMMISSION OF UTAH

By Keith E. Sohm
Keith E. Sohm
Administrative Law Judge

KES:dmh

cc: Lydia J. Torgerson, 595 South 800 West, Richfield, UT 84701
State Insurance Fund, Attn: Bruce Wilson, Attorney at Law
Second Injury Fund, Attn: Gilbert Martinez, Administrator



THE INDUSTRIAL COMMISSION OF UTAH

CASE NO. 83000039

LYDIA J. TORGERSON,	*	
	*	
Applicant,	*	
	*	ORDER
vs.	*	
	*	
RICHFIELD CARE CENTER,	*	
STATE INSURANCE FUND,	*	
and SECOND INJURY FUND,	*	
	*	
Defendants.	*	
	*	

* * * * * * * * * * * * * * * * * * * *

An Order was entered in this case denying benefits to the Applicant based on the 1982 incident. The Order acknowledged that the Applicant may have been involved in an accident during the course of her employment with Defendant Company on July 6, 1980 but no Application had been filed for that incident. The Applicant, by and through her attorney, filed a Motion for Review requesting the Law Judge take official notice of the July 6, 1980 incident and refer the matter to the Medical Panel to evaluate that industrial injury along with the January 20, 1982 incident.

The Defendants contended, in response to that Motion, that the 1980 incident was barred by the three year Statute of Limitations in Section 35-1-99. The Administrative Law Judge finds that the Hearing was held in this case April 25, 1983 and at the Hearing there was a sufficient disclosure regarding the July 1980 industrial injury together with with medical reports to be considered notice to the Commission sufficient to meet the tests of Section 35-1-99 and that those disclosures, of course, were provided the Commission in less than three years.

The Administrative Law Judge finds that the Motion to reopen and refer the matter to a Medical Panel is well taken.

CONCLUSIONS OF LAW:

The Order of May 4, 1983 should be set aside and the matter reopened and referred to a Medical Panel for evaluation allowing the Medical Panel to evaluate the affects of the July 1980 accident along with the January 20, 1982 incident.

ORDER:

IT IS HEREBY ORDERED that the Order of the Administrative Law

dated May 4, 1983 be, and is hereby, set aside, that the Applicant file an Application involving the July 6, 1980 incident and that the matter be referred to a Medical Panel for evaluation in connection with both the 1980 and 1982 incidents.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed, this Order shall be final and not subject to review or appeal.

Keith E. Sohm
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 21 day of February, 1984.

ATTEST:

/s/ Linda J. Strasburg

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on February 21, 1984 a copy of the attached ORDER was mailed to the following persons at the following addresses, postage paid:

Lydia J. Torgerson
595 South 800 West
Richfield, Utah 84701

Richfield Care Center
1000 North Main
Richfield, Utah 84701

Fred Silvester, Esquire
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THE INDUSTRIAL COMMISSION OF UTAH

By Diana M. Hocking
Diana M. Hocking
Secretary

ATTACHMENT C

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 83000039

LYDIA J. TORGERSON, Applicant, vs. RICHFIELD CARE CENTER, STATE INSURANCE FUND, and SECOND INJURY FUND, Defendants.	*	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on April 25, 1983 at 10:00 A.M. O'Clock. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Keith E. Sohm, Administrative Law Judge.

APPEARANCES: The Applicant was present and represented by Michael R. Labrum, Attorney at Law.

The Defendants were represented by Fred Silvester, Attorney at Law.

The Second Injury Fund was represented by Gilbert A. Martinez, Administrative Law Judge.

FINDINGS OF FACT:

The original Application was filed to consider an incident which occurred January 20, 1982. No claim was made for a 1980 incident. After considering all the facts the Administrative Law Judge issued an Order May 4, 1983 denying the Application as to the January 20, 1982 incident inasmuch as the facts in connection with that incident did not constitute an accident. All of the facts in the case are set forth in detail in that report.

Thereafter, the Applicant filed a Motion for Reconsideration and an Application for benefits pursuant to the 1980 injury and an Application for Relief in connection with the 1980 injury was also provided by the Applicant. The Defendants objected to the reopening and claimed a Three Year Statute of Limitations barred the Applicant from further consideration in that matter. An Order was issued by the Administrative Law Judge reopening the case and

setting aside the Order of May 4, 1983 and referring to a Medical Panel for evaluation as to the effects of the July 1980 accident along with the January 20, 1982 incident.

The Applicant began work with the Defendant Company July 1979 with her principal duties being to help dress patients and prepare them for their daily routine which required the Applicant to be constantly lifting, supporting, manuvering, and dressing patients every morning or preparing the patients for bed. During the course of her employment with the Defendant Company on or about July 6, 1980 the Applicant was trying to place a patient in a chair and fell striking first the wall and then hitting the floor. She suffered pain in the low back area which was medically treated apparently in the Hospital. Three days later surgery was performed for a hysterectomy and to repair a ruptured bladder. The Applicant thought that it was the ruptured bladder that hurt rather than the injured back. The Applicant indicated that she had no further pain in her back or treatment for her back, however, a letter from Dr. Henry, an Orthopedic Physician indicates that he examined her at the Richfield Hospital on July 10, 1980 in regards to low back pains. The Applicant indicated on cross-examination that she wore a back brace continually from July 1980 until January 1983.

The medical aspects of the case were referred to a Medical Panel for evaluation. The Medical Panel returned its Report copies of which were circulated to all of the parties as was a Supplemental Report. There being no Objection to the Medical Panel Reports the same are received in evidence, the Findings therein adopted by the Administrative Law Judge as his own which are as follows:

> There is no medically-demonstrable causal connection between the problems in her bladder and uterus and the industrial accident. Based upon the review of medical records, these conditions are the normal conditions found in a woman of middle age who has had several pregnancies.
>
> As far as the herniated disk at L4-5 is concerned, it is the opinion of the Panel that this is related to the industrial accident. It is our opinion that this began with the injury of 1978, was aggravated by the injury of 1980, and was further aggravated and required surgery following the injury of 1982.
>
> 2. The periods of time during which the applicant was temporarily totally disabled as a result of the industrial injury were from January 20, 1982, to March 3rd, 1982, and from June 29th, 1982, until she returned to work in January of 1983.
>
> 3. The applicant's total physical impairment is related to the disk herniation and her low back problem. We note that Doctor Jackson gives her a permanent partial impairment of 5 per cent of the whole body. The Guides to the Evaluation of Permanent

Impairment of the American Medical Association state that a surgically-operated disk with no residuals rates as a 5 per cent impairment of the whole body. The Recommendations of the Academy of Orthopedic Surgeons states that a surgically-operated disk rates as a 10 per cent impairment of the whole body.

We note that Doctor Jackson, the treating physician, rates her as a 5 per cent impairment of the whole body. This would be consistent with the Guides to the Evaluation of Permanent Impairment of the American Medical Association in that she has had an operated disk and, based upon all examinations, she has no residuals. She does not complain of pain, there is no motor weakness or atrophy, and physical examination shows no significant neurological defect.

Because of the discrepancy between the two rating systems, it is the opinion of the panel that we should average the two and rate her permanent partial impairment as 7 & 1/2 percent of the whole body.

4. The percentage of permanent physical impairment attributable to the accident of July 6th, 1980, is 2 & 1/2 per cent of the whole body. The permanent impairment related to the accident of January 20th, 1982 is 2 & 1/2 per cent of the whole body.

5. The percentage of permanent physical impairment attributable to conditions prior to July 6th, 1980, is 2 & 1/2 per cent of the whole body.

6. It is our opinion that the injuries of 1980 and 1982 did medically aggravate the pre-existing impaired condition of the Applicant.

7. The hysterectomy done in 1980 was not required as a result of the industrial accident. The treatment by Doctor Smoot in 1982 and the surgery done by Doctor Jackson on her low back in 1982 were required as a result of the industrial injury.

8. It is the opinion of the panel that Ms. Torgerson will require no further treatment including surgery or medication as a result of the industrial injury.

The Law Judge finds that there was no causal connection between the bladder and uterus problems and the industrial accidents but that there was a causal connection between the herniated disk and the industrial accidents with the problem beginning with an injury of 1978 aggravated by the injury of 1980 and further aggravated and requiring surgery following the injury of 1982.

The Applicant was temporarily totally disabled as a result of the

industrial injuries from January 20, 1982 to March 3, 1982 and from June 29, 1982 until January 1983.

The Applicant sustained an overall permanent partial impairment rating of 7 & 1/2 per cent of the whole body with 2 & 1/2 per cent assigned to the July 1980 incident and 2 & 1/2 per cent assigned to the January 20, 1982 incident and 2 & 1/2 per cent assigned to the conditions prior to the 1980 incident. The Panel found that the Applicant should not require further treatment or surgery as the result of the industrial injury.

The Applicant was earning $3.80 an hour working 40 hours a week and though she was divorced was responsible for the support of five minor children resulting in a weekly entitlement of $126.32 a week.

Though the Administrative Law Judge found the 1982 incident did not amount to an accident for which benefits could be recovered in the first Order we now find that the Applicant is entitled to benefits as a result of the 1982 incident inasmuch as it was an incident which aggravated a previous industrial injury with the same employer. The Applicant is entitled to temporary total disability compensation for the periods of time indicated above totalling 33 weeks which when multiplied times $126.32 would equal $4,168.56 less $702.85 already paid by the Defendant State Insurance Fund for a resultant figure of $3,466.00 to be paid by the State Insurance Fund. The Applicant is further entitled to benefits based on 5 per cent or 15.6 weeks which when multiplied times $126.32 would equal $1,971.00 to be paid by the State Insurance Fund and 2 & 1/2 per cent or 7.8 weeks times $126.32 which would equal $985.00 to be paid by the Second Injury Fund.

We note that the Defendant Insurance Carrier has paid medical costs in the amount of $1,362.48. The Defendant employer and the State Insurance Fund are entitled to reimbursement from the Second Injury Fund for payments of temporary total disability and medical expenses based on ratio of 2 & 1/2 over 7 & 1/2 or 33 per cent.

CONCLUSIONS OF LAW:

The Defendant should pay the Applicant the sums set forth above.

ORDER:

IT IS HEREBY ORDERED that the Defendant employer and Insurance Carrier pay the Applicant $3,466.00 for temporary total disability compensation and $1,971.00 for permanent partial impairment benefits.

IT IS FURTHER ORDERED that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer, as Custodian of the Second Injury Fund, to pay the Applicant compensation at the

rate of $126.32 for 7.6 weeks for a total of $985.00 as compensation for a 2 & 1/2 per cent pre-existing permanent physical impairment which sum is to be paid in a lump sum and to reimburse the State Insurance Fund to the extent of 33 per cent of the amounts expended herein for temporary total disability and medical expenses upon the filing of a duly Verified Petition certifying the amounts thus expended.

IT IS FURTHER ORDERED that Defendants pay all medical expenses incurred as the result of this accident in accordance with the Medical and Surgical Fee Schedule of this Commission.

IT IS FURTHER ORDERED that Michael Labrum, Attorney for the Applicant, be paid the sum of $1,284.40, the same to be deducted from the aforesaid award.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed, this Order shall be final and not subject to review or appeal.

Keith E. Sohm
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 3-4th day of November, 1984.

ATTEST:

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on October 3, 1984 a copy of the attached FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was mailed to the following persons at the following addresses, postage paid:

Lydia J. Torgerson
595 South 800 West
Richfield, Utah 84701

Michael R. Labrum
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108 North Main
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Richfield Care Center
1000 North Main
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Fred Silvester
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Salt Lake City, Utah 84101

Gilbert A. Martinez
Administrator
Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By Diana

ATTACHMENT D

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261 East Broadway, Suite 300
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THE INDUSTRIAL COMMISSION OF UTAH

Case No. 83000039

LYDIA J. TORGERSON,	:	
Applicant,	:	
-v-	:	MOTION FOR REVIEW
RICHFIELD CARE CENTER, STATE INSURANCE FUND, and SECOND INJURY FUND,	:	
Defendants.	:	

Richfield Care Center and the Utah State Insurance Fund, by and through counsel of record, hereby submit the following Motion for Review in the above entitled action.

POINT I

THE COMMISSION SHOULD REINSTATE THE ADMINISTRATIVE LAW JUDGE'S FINDINGS OF MAY 4, 1983 DECLARING THE INCIDENT ON JANUARY 20, 1982 AS NOT CONSTITUTING AN INJURY BY ACCIDENT UNDER UTAH LAW.

The Findings of Fact of the Administrative Law Judge state:

> The applicant had worked at the Richfield Care Center since July of 1979 with her principal duties being to help dress patients and prepare them for their daily routine, which required constant lifting, supporting, maneuvering, and dressing patients every morning or, if on a different shift, doing similar work preparing patients for bed. There was nothing unusual about the activities on the morning of January 20, 1982 nor was

> there any unusual strain, twisting, fall, bump, or even an unusual movement.
>
> In the this (sic) case there was no unusual exertion nor anything unusual about the activities of the applicant. There was no unanticipated, unintended occurrence different from what would normally be expected to occur, and there was no unforeseen or unexpected event to precipitate the symptoms complained of by the applicant. The movements being made by the applicant were movements made hundreds of times before and, at least, as to the straightening of patients' clothes, were no different from movements made by any ordinary person in the process of doing everyday activities such as dressing and undressing.

It is the position of the Utah State Insurance Fund that this is an accurate statement reflecting the testimony of the applicant at hearing. As the Administrative Law Judge accurately pointed out in his first Order, the Findings are directly in point with Sabo and do not constitute an injury by accident.

The Administrative Law Judge did not reverse these Findings in his Order of October 3, 1984; but, rather, found the applicant entitled to benefits by finding that this was an aggravation of a previous industrial injury with the same employer. The provisions of Utah Code Ann., Section 35-1-69 in no way modify the provisions of Utah Code Ann., Section 35-1-42 which require that in order for an applicant to be entitled to compensation, the applicant must suffer an injury by accident in the course of employment.

The facts here are clearly analogous to the Donald Glen Mason case, in which Mr. Mason, having pre-existing back difficulties, lifted 100-pound bags of whey, and at least on two occasions felt pain in his back. In Mason the Supreme Court clearly found

that since an accident did not occur in the course of employment, Mr. Mason was not entitled to compensation.

Based on this law, the Administrative Law Judge's Findings of Fact and his May 1983 Order constitute the proper findings in this case, and the Utah State Insurance Fund respectfully requests the Commission to reverse the award of compensation based on the non-accidental occurrence of January 20, 1982.

POINT II

EVEN IF THE 1982 INCIDENT CONSTITUTED AN INJURY BY ACCIDENT, THE ADMINISTRATIVE LAW JUDGE SHOULD ADJUST HIS CALCULATIONS REGARDING THE RATE OF COMPENSATION WHICH THE APPLICANT IS ENTITLED TO AND THE AMOUNT OF REIMBURSEMENT DUE FROM THE SECOND INJURY FUND.

The medical panel appointed by the Administrative Law Judge found, and the Administrative Law Judge agreed, that the applicant sustained an overall permanent partial impairment of 7.5% of the whole body. The medical panel allocated this by indicating that 2.5% of that impairment pre-existed the incident of July of 1980, 2.5% was caused by the incident of July of 1980, and 2.5% was caused by the incident of January 20, 1982. The Administrative Law Judge found that the applicant was earning $3.80 per hour for a 40-hour week, but failed to review the record to determine that that was the rate of pay for the 1982 occurrence. There is nothing in the record regarding the applicant's rate of pay during 1980; therefore it is improper to calculate the entire compensation rate based on the 1982 rate.

Further, since this is an application for compensation for two industrial incidents, because the Administrative Law Judge

allowed for amendment of the application to claim two incidents (one in 1980 and one in 1982), those incidents must be calculated separately. Therefore, if in fact the applicant suffered an increase in impairment from 2.5% which was not attributable to industrial causes to 5% as a result of the 1980 incident, the Utah State Insurance Fund, having paid temporary total compensation and medical benefits on that incident, would be entitled to a 50% reimbursement for all temporary total compensation and medical benefits attributable to the 1980 incident.

In addition, if the 1982 incident is determined to be an accident, clearly the State Insurance Fund would be liable for the permanent partial impairment attributable to that incident; but, having satisfied its temporary total and medical expense obligation on the 1980 incident, the 2.5% attributable to pre-existing conditions and the 2.5% permanent impairment attributable to the 1980 incident would be pre-existing conditions, pursuant to Section 69; therefore the State Insurance Fund would be entitled to reimbursement from the Second Injury Fund for two-thirds of the medicals and temporary total compensation on the 1982 incident since the combined disabilities of the 1982 incident show 2.5% permanent partial impairment attributable to the 1982 incident and 5% permanent partial impairment pre-existing the 1982 incident.

Therefore, even if the Commission were to find that the 1982 incident was an injury by accident, it is respectfully requested that the 1980 and 1982 incidents be treated as separate applications, which they are, and the calculations made separately on

each entitling the Utah State Insurance Fund to 50% reimbursement for temporary total compensation and medical benefits paid on the 1982 incident, and entitling the State Insurance Fund to a two-thirds reimbursement from the Second Injury Fund for medical benefits and temporary total compensation to be paid on the 1982 incident. It could be argued further that failure of the applicant to prove all the elements necessary for compensation, namely her wage rate, on the 1980 incident should preclude recovery on that incident.

DATED this 18th day of October, 1984.

BLACK & MOORE

Fred R. Silvester

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Motion for Review, postage prepaid, this 18th day of October, 1984, to the following:

Gilbert A. Martinez
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111

Michael J. Labrum
108 North Main
Richfield, UT 84701

State Insurance Fund
560 South 300 East
Salt Lake City, UT 84111

Susan Patton

ATTACHMENT E

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 83000039

LYDIA J. TORGERSON,

Applicant,

vs.

RICHFIELD CARE CENTER and/or STATE INSURANCE FUND, and SECOND INJURY FUND,

Defendants.

DENIAL OF

MOTION FOR REVIEW

On or about October 3, 1984, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about October 19, 1984, the Commission received a Motion for Review from the Defendants by and through their attorney.

Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed.

IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge dated October 3, 1984, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 13th day of December, 1984.

ATTEST:

Linda J. Strasburg
Commission Secretary

Walter T. Axelgard
Chairman

Stephen M. Hadley
Commissioner

Lenice L. Nielsen
Commissioner

CERTIFICATE OF MAILING

I certify that on December 14th, 1984 a copy of the attached Denial of Motion for Review was mailed to the following persons at the following addresses, postage paid:

Lydia J. Torgerson, 595 South 800 West, Richfield, UT 84701

Michael R. Labrum, Atty., 108 North Main, Richfield, UT 84701

State Insurance Fund, 560 South 300 East, SLC, UT 84111

Fred Silvester, Atty., 261 East 300 South, #300, SLC, UT 84111

Gilbert A. Martinez, Administrator, Second Injury Fun

THE INDUSTRIAL COMMISSION OF UTAH

by Wilma

ATTACHMENT F

per month" at the end of subd. (4); and made minor changes in phraseology.

Business of employer.

Owner of ten parcels of real property on which were 19 rental units which owner actively managed was in the rental business, and employee he hired to paint and repair units for forty hours a month was not within the exclusion of subd. (2) of this section. Sorenson v. Industrial Comm. (1979) 598 P 2d 362.

Loaned employee.

Where employee of trucking company was assigned by the company to haul a load of wood paneling for the defendant and directed by the company to assist defendant's employees in loading the truck, for purposes of this act the truck driver became defendant's employee during the loading process, and when he was injured in the course of it, his remedy against defendant was limited to the collection of workmen's compensation benefits. Bambrough v. Bethers (1976) 552 P 2d 1286.

35-1-45. Compensation for industrial accidents to be paid.

Accident.

Death of employee who had a preexisting heart weakness was the result of an "accident" arising out of and in the course of employment where death by heart attack occurred while working on the job, and because of a mechanical defect in the truck the employee was operating he was required to repeatedly hoist himself up into the cab, requiring a greater exertion than would have been required had the truck been working properly. Nuzum v. Roosendahl Constr. & Mining Corp. (1977) 565 P 2d 1144.

An internal failure brought about by exertion in the course of employment may be an accident without the requirement that the injury result from some incident which happened suddenly and is identifiable at a definite time and place; however, there must be a causal connection between the injury and the employment. Schmidt v. Industrial Comm. of Utah (1980) 617 P 2d 693.

Accident is an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events; thus, if an employee incurs unexpected injuries, including internal failures caused by the duties of his employment he is eligible for compensation under this section. Painter Motor Co. v.Ostler (1980) 617 P 2d 975.

Evidence that employee experienced a "catch" in his back while shoveling rock in the course of his employment was sufficient, in light of his history of work-related back injuries and medical condition, to establish that such shoveling incident could have added to or aggravated a job-induced preexisting back condition and that the injury and disability caused by the incident resulted from an accident. Kaiser Steel Corp. v. Monfredi (1981) 631 P 2d 888.

Claimant failed to prove that back injury received while engaged in his employment was the result of an accident where there was no evidence that showed anything unusual about his activities on the day of the injury or any unusual exertion or strain or contact with objects or a fall. Sabo's Electronic Service v. Sabo (1982) 642 P 2d 722.

Aggravation or acceleration of injury or disease.

Compensation was denied a truck driver who underwent surgery following two 1975 incidents of back discomfort on the job, which aggravated driver's scoliosis of the spine and spondylolysis, both of which conditions developed after a trucking accident suffered in 1972, since the type of work he was engaged in at the time of the 1975 incidents was not unusual or unexpected and the aggravation of his physical condition gradually developed without the intervention of any external occurrence or trauma. Farmers Grain Cooperative v. Mason (1980) 606 P 2d 237.

Arising out of or in course of employment.

Where the evidence affirmatively shows that the assigned duties of a traveling salesman include keeping his car in a safe and efficient running condition, there is a reasonable basis to support the commission's findings that injury to him while he was working on his car arose within the scope of his employment. Hafer's, Inc. v. Industrial Comm. of Utah (1974) 526 P 2d 1188.

Claimant was not entitled to compensation as a result of an automobile accident at the end of a claimed business and pleasure trip, where the trip was primarily to visit a personal friend and former employer of the claimant and the business end of the trip could have been accomplished in the claimant's office. Martinson v. W-M Insurance Agency, Inc. (1980) 606 P 2d 256.

A truck driver whose practice was to take home a tractor to clean and service it with the knowledge of his employers was acting in

the course of his employment when he was killed in an accident on his way home from his place of employment. Kinne v. Industrial Comm. (1980) 609 P 2d 926.

Conduct of employee in running to investigate and to offer help when it appeared that a fellow employee might be in danger or distress was a natural and reasonably expectable reaction so that his subsequent death from heart attack was an accident arising out of his employment; fact that deceased had a preexisting heart condition did not preclude finding that his death resulted from an accident in the course of employment. United States Steel Corp. v. Draper (1980) 613 P 2d 508.

Burden of proof.

The burden of proof in workmen's compensation cases is proof by a preponderance of the evidence. Lipman v. Industrial Comm. (1979) 592 P 2d 616.

Medical services.

Import of this section is that medicals are something additional to and separate from the compensation. Kennecott Copper Corp. v. Industrial Comm. (1979) 597 P 2d 875.

Self-inflicted injuries.

When employee slammed his fist against a locked, stationary metal door, it was foreseeable and expected that injury would result to his hand; the injury was therefore not an accident, and not compensable (reversing the Industrial Commission's award based on its finding that the injury was not self-inflicted). McKay Dee Hosp. v. Industrial Comm. (1979) 598 P 2d 375.

Law Reviews.

Schmidt v. Industrial Commission and Injury Compensability under Utah Worker's Compensation Law: A Just Result or Just Another "Living Corpse"?, 1981 Utah L. Rev. 393.

35-1-46. Employers to secure compensation — Ways allowed — Failure — Notice — Injunction — Violation — Penalty. Employers including counties, cities, towns and school districts shall secure compensation to their employees in one of the following ways: (1) By insuring, and keeping insured, the payment of such compensation with the state insurance fund, which payments shall commence within 90 days of any final award of the commission.

(2) By insuring, and keeping insured, the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state, which payments shall commence within 90 days of any final award by the commission.

(3) By furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner and when due as provided for in this title, which payments shall commence within 90 days of any final award by the commission. In such cases the commission may in its discretion require the deposit of acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred, and may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of law relating to the payment of compensation and the furnishing of medical, nurse and hospital services, medicines and burial expenses to injured, and to the dependents of killed employees. The commission may in proper cases revoke any employer's privilege as a self-insurer.

The commission is hereby authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this act, from further operation of the employer's business, where the employer has failed to insure or to keep insured in one of the three ways in this section provided, the payment of compensation to injured employees, and upon a showing of such failure to insure the court shall enjoin the further operation of such business until such time as such insurance has been obtained by the employer. The court may enjoin the employer without requiring bond from the commission.

If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided in this section, the commission may give such employer